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PENNSYLVANIA CLIENTS' SECURITY FUND — HOW SECURE IS THE PUBLIC?

*"St. Ives was a native of Brittany, a lawyer but not a thief, which
was a source of great wonder to the people."*

— Inscription upon the tombstone of St. Ives

I. INTRODUCTION

On November 17, 1975, Judge Nochem S. Winnet,¹ Chairman of the Administrative Board of the Pennsylvania Bar Association's Clients' Security Fund, submitted to the Pennsylvania Supreme Court² an amendment to the court's Rules of Disciplinary Enforcement.³ Judge Winnet's proposed amendment called for the creation of a statewide clients' security fund (CSF)⁴ to be administered by a board appointed by the Pennsylvania Supreme Court.⁵ The purpose of Judge Winnet's proposal was to remove the responsibility for operating the CSF from the Pennsylvania Bar Association and place it with the court.⁶ The supreme court, however, has failed to implement Judge Winnet's proposal;⁷ thus, the original Pennsylvania CSF, which began operation on February 2, 1960,⁸ remains the source of reimbursement for clients whose monies are misappropriated by their attorneys. The purpose of this Comment is to examine the present and proposed Pennsylvania CSF's, compare these fund arrangements with those operated in other jurisdictions, and suggest further

1. Judge Nochem S. Winnet served as a judge of the County Court of Philadelphia from 1940 to 1950 and is currently in private practice.

2. Letter from Judge Nochem S. Winnet to Chief Justice Benjamin R. Jones (November 17, 1975) (on file at the *Villanova Law Review*).

3. The Rules of Disciplinary Enforcement, which govern the procedure of the Disciplinary Board of the supreme court, are contained in rule 17 of the Rules of the Pennsylvania Supreme Court, PA. SUP. CT. R. 17. See PA. R.D.E., 204 Pa. Code §§ 83.17-1 to -25 (current version at 6 PA. BULL. 1779-88 (1976)). Judge Winnet's proposed amendment would add sections 83.301-304 to the Pennsylvania Code codification of rule 17. Proposed Amendment to PA. R.D.E. §§ 83.301-304 [hereinafter cited as Proposed Amendment] (see Appendix I). Subsequent to the formulation of the proposed amendment, however, rule 17 was amended and renumbered. See PA. R.D.E. 103-403, 6 PA. BULL. 1779-88 (1976). In discussing the currently effective disciplinary rules, this Comment adheres to the numbering scheme of the amended version of rule 17 as set forth in the *Pennsylvania Bulletin*, *id.* References to specific sections of Judge Winnet's amendment conform to the Pennsylvania Code designation, *supra*.

4. Proposed Amendments, *supra* note 3, at § 83.302(a).

5. *Id.* § 83.303(a). The board would consist of seven members of the Pennsylvania bar. *Id.*

6. Interview with Judge Nochem S. Winnet, Chairman of the Administrative Board of the Pennsylvania Bar Association's Clients' Security Fund, in Philadelphia (September 28, 1976) [hereinafter cited as Interview with Judge Winnet].

7. Letter from Judge Nochem S. Winnet to the author (January 18, 1977) (on file at the *Villanova Law Review*). Both the Philadelphia and Pennsylvania Bar Associations have endorsed Judge Winnet's plan. The Retainer, May 12, 1976, at 1, col. 1.

8. The rules governing the operation of the present CSF are contained in the Rules of Procedure, Clients' Security Fund Administration Board, Pennsylvania Bar Association. PA. B.A.R.P. I(4) (a) (see Appendix II).

changes in and alternatives to the structure and operation of the Pennsylvania CSF.

II. GENERAL PHILOSOPHY AND HISTORY OF THE CSF

A. Purpose and Philosophy

The general purpose of a CSF is to establish a source of monies through contributions by members of the legal profession from which restitution may be made to the victims of attorney defalcations.⁹ While it should be clear, not only to attorneys but to the public as well, that the misappropriation of client funds constitutes illegal and unethical conduct,¹⁰ the initiation of disciplinary proceedings against an attorney after the defalcation has occurred, even assuming subsequent discipline, is of little practical value to the client. His loss has already been sustained and, aside from the rather tenuous satisfaction of seeing the attorney disciplined and the knowledge that he has performed his civic duty in protecting the rest of the public,¹¹ the client receives no pecuniary benefit.¹² CSF's are designed to fill this void.

The CSF also serves the additional purpose of counteracting much of the adverse publicity received by the bar when the defalcation is initially

9. Scott, *Clients' Security Fund Plan Developed for Philadelphia*, 21 THE SHINGLE 177 (1958). It should be noted that not all defalcations are the result of acts by dishonest attorneys; some losses are inadvertent and result solely from poor bookkeeping. Carpenter, *The Negligent Attorney Embezzler: Delaware's Solution*, 61 A.B.A.J. 338-39 (1975). Some of the CSF's in operation throughout the country provide that the claimant's loss must have arisen out of the attorney's conduct as an attorney and during the course of an attorney-client relationship. See Note, *The Disenchanted Client v. The Dishonest Lawyer: Where Does the Legal Profession Stand?*, 42 NOTRE DAME LAW. 382, 392 (1967).

10. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-102(B)(3), (4) (1970), which provides that a lawyer shall

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Id.

Misappropriation of client funds is also covered by Disciplinary Rule (DR) 1-102(A) which states that "[a] lawyer shall not engage in illegal conduct involving moral turpitude," *id.* 1-102(A)(3), or "conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.* 1-102(A)(4).

11. Interview with John W. Herron, Esquire, Assistant Disciplinary Counsel in Charge of District I (Philadelphia County) of the Disciplinary Board of the Supreme Court of Pennsylvania, in Philadelphia (September 28, 1976) [hereinafter cited as Interview with John W. Herron]. It has been suggested that DR 9-102 of the ABA Code of Professional Responsibility is inadequate for safeguarding client funds and may actually lull clients into a false sense of security. Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 685 (1973); see note 27 and accompanying text *infra*.

12. The present Pennsylvania Rules of Disciplinary Enforcement (see note 3 *supra*) provide no monetary relief for the complainant in a disciplinary proceeding.

uncovered.¹³ It has been said that "[t]he fund is created at the request of the bar for the purpose of establishing as far as practicable the collective responsibility of the bar in respect to losses caused to clients and others by defalcating members of the bar."¹⁴ This public relations benefit has been strongly documented by other common law countries which have already established such funds.¹⁵

Despite the commendable objectives of the bar in this regard, the establishment of CSF's has aroused strong opposition in some instances.¹⁶ The criticisms most frequently voiced are that the CSF makes the honest members of the bar liable for the misdeeds of their colleagues, publicizes the dishonesty of lawyers and reflects poorly upon the profession in general, and encourages the dishonest attorney because he knows that the members of the bar, rather than his client, will suffer the consequences of his actions.¹⁷ Additionally, it has been argued that the small number of attorney defalcations each year do not mandate such drastic action.¹⁸

Perhaps the most salient argument in response to these criticisms is that CSF's help preserve the ideal of a self-disciplined bar. As one commentator has observed:

The [public] . . . [has] given the legal profession the power to admit new members and to discipline and disbar wrong-doing members, subject only to supervision by the [state] Supreme Court. As a profession, we think it is in the public interest that we be given these powers. However, these powers impliedly carry with them certain responsibilities. One of these should properly be responsibility for the basic honesty of our individual members. . . . The public should . . . believe that lawyers won't steal money entrusted to them by their clients. In the few instances in which a lawyer violates that trust, the profession as a whole should underwrite that integrity by making restitution to the client.¹⁹

This argument is essentially that the bar, in order to maintain its independent character, must implement programs such as CSF's, which will add to the public confidence in the effectiveness and sincerity of the bar's disciplinary mechanism.²⁰

13. Sterling, *The Argument for a Clients' Security Fund*, 36 J. ST. B. CALIF. 957, 958 (1961). The embezzlement of client funds by an attorney is newsworthy because it is a criminal act which does not occur often. *Id.* News of such conduct by an attorney reflects badly upon the ability of attorneys to police their own ranks. *Id.* However, reimbursement of a client by a CSF should also be newsworthy and should tend to restore public confidence in the profession. *Id.*

14. Proposed Amendment, *supra* note 3, at § 83.302(a).

15. See Voorhees, *A Progress Report: The Clients' Security Fund Program*, 46 A.B.A.J. 496, 497 (1960).

16. See generally Scott, *Some Pros and Cons of the Client Security Fund Proposal*, 22 THE SHINGLE 17 (1959).

17. See McKnight, *The Argument Against Clients' Security Fund*, 36 J. ST. B. CALIF. 963, 964 (1961); Outcault & Peterson, *supra* note 11, at 686.

18. McKnight, *supra* note 17, at 964; Outcault & Peterson, *supra* note 11, at 686.

19. Sterling, *supra* note 13, at 957.

20. For general discussions of the self-disciplined bar, see Wright, *Self Discipline of the Bar: Theory or Fact?*, 57 A.B.A.J. 757 (1971); Note, *The Legal Profession's*

B. *History*

The first CSF in the United States was established in Vermont in 1959.²¹ Quickly following Vermont's lead, the Philadelphia and Pennsylvania Bar Associations established their CSF's in 1960.²² By January 1, 1976, forty-six states and the District of Columbia had instituted some form of CSF.²³

However, these seemingly significant strides toward the protection of clients' monies must be viewed in perspective. In contrast to other common law countries, the United States has lagged far behind in the establishment of CSF's and other client-protecting measures. As early as 1918, New Zealand had a statute providing for the audit of solicitors' trust accounts²⁴ and in 1929 created the first CSF.²⁵ England established its fund via statute in 1941.²⁶

Furthermore, unlike CSF's in the United States, the operation of CSF's in other countries²⁷ is usually coupled with a mandatory audit of the attorney's books.²⁸ For example, in 1964 the Ontario Law Society instituted a "blitz" audit plan under which outside auditors, working under the direction of the Society's auditor, would randomly select a lawyer and

Attempt to Discipline Its Members: A Critique of the Clark Report, 1970 UTAH L. REV. 611. For a layman's opinion of the bar's self-disciplining ability, see Bull, *Lawyers Have a Crisis of Confidence*, Phila. Inquirer, Oct. 19, 1956, § A, at 9, col. 1.

21. Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A.J. 757, 757 (1969).

22. *Id.*

23. Standing Committee on Clients' Security Fund, *Midyear Meeting Report*, [1976] A.B.A. REP. No. 238. The only states that did not have some form of CSF as of January 1, 1976, were North Carolina, South Carolina, Wisconsin, and Utah. *Id.*

24. *Solicitors' Guarantee Fund*, 6 N.Z.L.J. 13, 13 (1930).

25. *Id.* Remarkably, the New Zealand fund provided wider coverage to clients than most American funds in operation today. For example, the New Zealand fund provided for losses suffered because of theft by a solicitor or his servant or agent. *Id.* The author's research revealed no American fund that would cover such a situation. For the rules governing recovery under the New Zealand fund as originally created, see *Solicitors' Guarantee Fund*, 6 N.Z.L.J. 370 (1930).

26. G. GRAHAM-GREEN, *CORDERY'S LAW RELATING TO SOLICITORS* 9 (6th ed. 1968). The English Compensation Fund is administered by the Law Society, whose membership is open only to solicitors, as opposed to barristers (trial lawyers). *Id.* at 1. A solicitor's membership, however, is not mandatory. *Id.* at 2. The solicitor's monetary contribution to the Compensation Fund is determined by his experience. *Id.* at 9. During his first three years no contribution is required; during the next three years he pays one-half the normal rate and thereafter the full amount. *Id.* Although payment of claims is discretionary under the English fund, all claims which have been allowed have been paid in full, *id.*, even in 1957, when approved claims against one solicitor totaled approximately \$1,680,000. M. BLOOM, *THE TROUBLE WITH LAWYERS* 44 (1968). The Law Society spent \$140,000 in investigating this single matter. *Id.*

27. For general discussions of CSF's in other countries, see McLeod, *Explaining the Security of Clients' Moneys; I.E. Fidelity, Guarantee or Compensation Funds*, in INT'L B. ASS'N, 9th CONFERENCE REPORT (1962); Note, *supra* note 9.

28. See text accompanying note 24 *supra*; Address by Kenneth Jarvis, Q.C., Joint Meeting of the ABA Standing Committee on Clients' Security Fund and the National Organization of Bar Counsel (Aug. 4, 1973) (on file at the Villanova Law Review).

conduct an audit of his books.²⁹ By the middle of 1967, more than sixty-five percent of the lawyers in the province had been audited.³⁰ By the end of 1972, the "blitz" audit had resulted in fifty-seven formal complaints, seventeen disbarments, four suspensions, twenty-two reprimands, and four resignations.³¹ These figures, gathered over the course of eight years, should be contrasted with comparable statistics for the year prior to the institution of the plan, during which time twenty-two attorneys were either disbarred or suspended.³² Thus, such a plan is useful not only in detecting the dishonest attorney, but it also acts as a deterrent to culpable conduct by attorneys.

III. THE CURRENT PENNSYLVANIA CSF

A. General Organization

Established in February 1960 by the Pennsylvania Bar Association (PBA),³³ the current Pennsylvania CSF is administered by a board selected from members of the PBA.³⁴ Each year the PBA contributes \$10,000 to the fund,³⁵ and as of September 28, 1976, the balance in the fund totaled approximately \$60,000.³⁶

Concurrently with the institution of the state fund, the PBA encouraged county bar associations to establish local CSF's to supplement the PBA's fund.³⁷ However, as of September 28, 1976, some sixteen years after the establishment of the state fund, only thirteen of the sixty-six Pennsylvania counties had created such funds.³⁸ The PBA state fund

29. M. BLOOM, *supra* note 26, at 46-47. The rationale underlying such a plan is that because a lawyer does not know when his books will be audited, he will constantly keep them up to date and correct. *Id.* at 46. Besides subjecting every lawyer to the possibility of a "blitz" audit, the Ontario plan requires him to file with the Law Society an annual report prepared by an accountant which states that the accountant has inspected the lawyer's records and determined that everything was in order. Manahan, *Lawyers Should Be Audited*, 59 A.B.A.J. 396, 397 (1973). Failure to file such a report results in an automatic audit at the lawyer's expense. *Id.* at 397.

30. M. BLOOM, *supra* note 26, at 46.

31. Manahan, *supra* note 29, at 397.

32. M. BLOOM, *supra* note 26, at 47.

33. Standing Committee on Clients' Security Fund, *Report*, 96 A.B.A. REP. 595, 598 (1971).

34. Interview with Judge Winnet, *supra* note 6; Committee on Clients' Security Fund, *Report*, 67 PA. B.A. REP. 176, 176-77 (1962).

35. Interview with Judge Winnet, *supra* note 6. Of the 19,028 attorneys currently registered to practice in Pennsylvania, 11,880 are members of the PBA. Figures supplied by PBA (on file with the *Villanova Law Review*). Therefore, as presently organized, the state CSF receives contributions only from bar members through their dues and not from all the attorneys in the state. Interview with Judge Winnet, *supra* note 6. The CSF does, however, protect a client regardless of whether his attorney is a member of the PBA. *Id.*

36. Interview with Judge Winnet, *supra* note 6.

37. Committee on Clients' Security Fund, *Report*, 67 PA. B.A. REP. 176, 176-77 (1962).

38. Interview with Judge Winnet, *supra* note 6. The counties which created their own funds are Adams, Berks, Bucks, Crawford, Dauphin, Erie, Lancaster, Luzerne,

reimburses the county funds for up to fifty percent of their expenditures made on allowed claims.³⁹

B. Procedure for Recovering Under the PBA Fund

The current PBA Rules of Procedure⁴⁰ governing the CSF require that for any claim to be a reimbursable loss it must have been caused by the "dishonest conduct of a lawyer acting as a lawyer, and arise out of his employment by a client."⁴¹ The rules specifically exclude from reimbursable losses the losses of wives, members of the immediate family, dependents, partners, and associates of the lawyer,⁴² as well as losses incurred while a lawyer was acting as a fiduciary.⁴³

Under the present format, the claimant initiates the recovery procedure by filing an application with the CSF Administrative Board.⁴⁴ In this application, the claimant must not only describe the conduct of the attorney which resulted in the alleged reimbursable loss, but also establish that since the commission of such acts, the attorney has either died, disappeared, or been disbarred or suspended from practice by the Pennsylvania Supreme Court.⁴⁵ The claimant's application is then assigned to a member of the CSF committee or any other member of the PBA — preferably one who practices in the same county as the alleged defalcating attorney — who conducts an investigation of the matter.⁴⁶ A copy of

Lycoming, Mercer, Montgomery, Philadelphia, and Schuylkill. Sarge, *Client Security Fund Proposed*, Sunday Patriot-News, Apr. 18, 1976, § D, at 1, col. 1.

39. Interview with Judge Winnet, *supra* note 6. Since a number of large claims have come from Philadelphia, the county with the largest number of practicing attorneys, the state CSF will reimburse the Philadelphia County CSF for up to only 25% of expenditures on allowed claims rather than the normal 50%. Interview with Abraham Gafni, Esquire, Chairman of the Philadelphia CSF, in Philadelphia (Sept. 28, 1976) [hereinafter cited as Interview with Abraham Gafni]. In the 54 counties without separate CSF's, the state CSF must carry the brunt of the responsibility; it is therefore flexible in the percentage of any claim it will reimburse. Interview with Judge Winnet, *supra* note 6; see Sarge, *supra* note 38.

40. It should be noted that the state CSF Board may waive literal adherence to the rules. See PA. B.A.R.P. VI.

41. *Id.* I(4)(b). Dishonest conduct is defined as "wrongful acts committed by a lawyer . . . in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value." *Id.* I(5).

42. *Id.* I(4)(a).

43. *Id.* I(4)(b). There appears to be no logical reason for this exception. In fact, since a fiduciary is subject to very strict standards of conduct and is ordinarily entrusted with the funds of others, it is submitted that it would be especially appropriate for losses incurred while a lawyer was acting in a fiduciary capacity to be reimbursable. Judge Winnet's proposal would remove such a restriction. See Proposed Amendment, *supra* note 3, at § 83.304(c).

44. PA. B.A.R.P. II. If the county operates a CSF, the claimant must apply to the county rather than the state CSF. Interview with Judge Winnet, *supra* note 6. CSF rules may vary from county to county. *Id.*

45. Interview with Judge Winnet, *supra* note 6.

46. PA. B.A.R.P. III(A). The preference for an investigating attorney who is from the same county as the attorney who is the subject of the application is founded

the claimant's application is also sent to the attorney who is claimed to have committed the dishonest act.⁴⁷ Next, the investigating attorney submits the report of his investigation to the chairman of the CSF Administrative Board.⁴⁸ Applications are reviewed by the board, and on the basis of the information contained in both the application and the investigating attorney's report, the board may, in its discretion, hold a hearing at which the claimant and/or the alleged defalcating attorney may present their views.⁴⁹

The decision as to the amount, if any, to which the claimant is entitled is made at a meeting of the CSF Board.⁵⁰ The board considers the following factors in making its determination: 1) the client's contribution to the cause of the loss;⁵¹ 2) the hardship suffered by the client;⁵² 3) the total amount of reimbursable losses of the clients of any one lawyer;⁵³ 4) reimbursable losses of previous years for which total reimbursement has not yet been made;⁵⁴ and 5) the total amount in the CSF at that time.⁵⁵ However, the maximum amount that any one claimant may receive from the fund is \$15,000.⁵⁶ In the event that the board decides to reimburse the claimant, he must agree to subrogate the CSF in the amount he recovers from the fund.⁵⁷

mainly upon convenience. Interview with Judge Winnet, *supra* note 6. However, it is submitted that the opportunity for a biased result is enhanced by following such a procedure. Cf. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 24-29 (Final Draft 1970) [hereinafter cited as CLARK REPORT] (criticizing the use of a decentralized system because of the difficulties involved in retaining objectivity when all parties know each other on a personal level).

47. PA. B.A.R.P. III(A).

48. PA. B.A.R.P. III(C). After submission to the chairman, the report is summarized and distributed to the other members of the CSF Board. *Id.*

49. *Id.* III(C), (F). After studying the summaries of the investigative reports or the report itself, any member of the CSF Board may request that testimony be given by the claimant or the alleged defalcating attorney. *Id.* III(F).

50. *Id.* III(G). The board is required to meet annually but may otherwise meet as often as it desires. *Id.* In order for a claim to be approved, it must be supported by a majority of the CSF Board members present and voting at the meeting at which the claim is processed. *Id.* III(G)(5).

51. *Id.* III(G)(1).

52. *Id.* III(G)(2). The English Compensation Fund allows for "hardship" grants to provide relief to those whose loss is likely to cause hardship. G. GRAHAM-GREENE, *supra* note 26, at 9. These grants are made in lieu of the normal recovery procedure under the fund. *Id.*

53. PA. B.A.R.P. III(G)(3); see text accompanying note 56 *infra*.

54. PA. B.A.R.P. III(G)(4). The large number of claims approved in one year is currently causing problems for the Philadelphia County CSF. Interview with Abraham Gafni, *supra* note 39; see text accompanying notes 63 & 64 *infra*.

55. PA. B.A.R.P. III(G)(4).

56. Interview with Judge Winnet, *supra* note 6.

57. PA. B.A.R.P. IV. The English fund has had some degree of success by way of subrogation payments. D. HOPSON & Q. JOHNSTONE, *LAWYERS AND THEIR*

C. *Shortcomings of the Present System*

Perhaps the most critical problem plaguing the present CSF is the lack of monies sufficient to pay approved claims. Between 1969 and 1974, fifty-eight claims were made to the CSF Board.⁵⁸ Of those claims, thirty-seven were approved, totalling \$249,065.⁵⁹ However, during this same period, only \$63,676 was paid out in claims.⁶⁰ Even if it is assumed that the county bar associations paid out at least an equal amount,⁶¹ \$121,713 of approved claims was never paid.⁶²

The problem of lack of funds becomes acute when a claim against one attorney is far in excess of the total amount in the fund. For example, the Philadelphia County Bar Association's CSF recently received claims totalling almost \$300,000 against a single attorney, of which over \$160,000 in claims was later approved.⁶³ Since neither the Philadelphia nor Pennsylvania CSF's were financially equipped to handle claims of this size, the Philadelphia fund was unable to pay its already approved claims.⁶⁴ The inability to pay approved claims doubtlessly weakens the credibility of the CSF in the eyes of the public, thus undercutting the public relations objective of the fund.⁶⁵

Another problem impairing the utility of the current PBA fund is its lack of publicity. While CSF's are established to provide better public relations for the bar,⁶⁶ the Pennsylvania Rules of Procedure for the CSF specifically provide: "No publicity shall be given by the Board to applications for reimbursement, payments made by the Board or to any action of the Board relating to such applications and reimbursements without the express prior approval of the Board of Governors of the Pennsylvania Bar Association."⁶⁷ This provision not only undercuts the public relations purpose of the fund, but also prevents the public from learning about it and the method by which their claims should be presented, thereby debilitating the essential purpose for which the CSF was established — reimbursement of clients for defalcations by their attorneys.⁶⁸

WORK 507 (1967). However, the Pennsylvania CSF has had little, if any, success in recovering funds under its subrogation provision. Interview with Judge Winnet, *supra* note 6.

58. Figures supplied by PBA (on file with *Villanova Law Review*). These figures do not include any Philadelphia claims filed in 1974. *Id.*

59. *Id.*

60. *Id.*; see notes 51-56 and accompanying text *supra*.

61. See note 39 and accompanying text *supra*.

62. Figures supplied by PBA (on file with *Villanova Law Review*).

63. Interview with Abraham Gafni, *supra* note 39.

64. *Id.*

65. See text accompanying notes 13-15 *supra*.

66. See notes 13-15 and accompanying text *supra*.

67. P.A. B.A.R.P. VII(A).

68. See note 9 and accompanying text *supra*.

IV. SUGGESTIONS FOR RESTRUCTURING THE PENNSYLVANIA CSF SYSTEM

A. Judge Winnet's Proposal

As noted earlier, Judge Winnet, in an effort to reform the Pennsylvania CSF, submitted a proposed amendment to the Pennsylvania Supreme Court⁶⁹ which would establish a fund in the Administrative Office of Pennsylvania Courts.⁷⁰ This fund would be administered by a CSF Board appointed by the Pennsylvania Supreme Court.⁷¹ The board would consist of seven members of the Pennsylvania Bar who would serve staggered terms.⁷² The fund would consist primarily of monies derived from an annual assessment of \$10 from each attorney admitted to practice within the state.⁷³ This sum would be required in addition to the \$35 presently assessed annually against attorneys practicing in Pennsylvania.⁷⁴ However, the proposed amendment further provides that if at the end of the year the CSF Board determines that there are sufficient funds to pay all existing claims as well as those anticipated for the coming year, the board may notify the Administrative Office, which will then forego collection of the \$10 assessment for that year.⁷⁵

Shifting the responsibility for the CSF from the PBA to the Pennsylvania Supreme Court should establish a centralized, unified CSF for the entire state — a result conceptually antithetical to that achieved by the current CSF, which is based upon the theory that each county bar association should establish its own fund.⁷⁶ While the present decentralized system has proved financially ineffective, the proposed CSF would provide greater financial resources through imposition of the additional \$10

69. See notes 1-6 and accompanying text *supra*.

70. Proposed Amendment, *supra* note 3, at § 83.302(a). While the fund would be established in the Administrative Office, it would actually be administered by the CSF Board. *Id.* § 83.303(a)-(c). Under such a system, the Administrative Office would be responsible for the physical control of the funds, but distribution could be made only upon the authorization of the CSF Board. *Id.*

71. Proposed Amendment, *supra* note 3, at § 83.303(a). The present CSF Administrative Board is selected by the Pennsylvania Bar Association. See note 34 and accompanying text *supra*.

72. Proposed Amendment, *supra* note 3, at § 83.303(a)-(b). Terms would run for three years, with no member serving more than two consecutive three-year terms. *Id.* § 83.303(b). The proposed amendment does not specify whether the board members would be compensated for their services.

73. *Id.* § 83.302(b).

74. See PA. R.D.E. 219(a).

75. Proposed Amendment, *supra* note 3, at § 83.302(c).

76. As noted earlier, when the original Pennsylvania CSF was established, the PBA sought to decentralize the fund to the greatest degree possible. See notes 37 & 38 and accompanying text *supra*. It is submitted, however, that a decentralized CSF structure can produce a lack of uniformity in its results, since a number of adjudicatory bodies are deciding the same types of cases under varying procedures. Cf. CLARK REPORT, *supra* note 46, at 24-29 (criticizing the decentralization of state disciplinary systems).

assessment.⁷⁷ Although some critics of this \$10 assessment have voiced concern over potential future increases in this presently nominal fee,⁷⁸ such fears, while not groundless,⁷⁹ are unlikely to materialize.⁸⁰ Moreover, it appears that the Pennsylvania Supreme Court has the authority to levy such an assessment upon attorneys.⁸¹

77. Proposed Amendment, *supra* note 3, at § 83.302(b). If every attorney paid the \$10 fee, a fund of approximately \$190,280 would be created yearly, as compared with the present \$10,000 a year contribution made by the PBA. Hopefully, this would help solve the problem arising when a claim against one attorney exceeds the total amount in the fund. See notes 63 & 64 and accompanying text *supra*.

78. Interview with Judge Winnet, *supra* note 6.

79. The concern that the fee will increase is not without some merit. The original assessment instituted to support the Disciplinary Board was \$25. PA. R.D.E. 219(a). The year following the establishment of the board, however, the assessment was raised to \$35. *Id.* 219(a).

80. Numerous reasons support the conclusion that the \$10 fee would not have to be increased. Any inflationary effects upon the fee should be offset by the fact that each year new attorneys are admitted to the bar and would be subject to the fee. Thus, there would be an ever-increasing pool of funds to counteract the effects of inflation. Also, it should be noted that the original fee for the Disciplinary Board was fixed at a time when no one could predict the exact operational costs of such a disciplinary system. Interview with John W. Herron, *supra* note 11.

Moreover, it is submitted that an assessment of attorneys is not the only means of raising funds for CSF's. The state of New Jersey, for example, is considering a plan that would require banks in the state to pay interest on monies kept in attorneys' trust accounts. Jaffee, *Lawyer Victim Fund Studies*, Sunday Star-Ledger, Oct. 24, 1976, at 1, col. 1. Although such payments are currently prohibited in New Jersey, a congressional act recently lifted this ban for some New England states. *Id.* One source has reported that while a bill that would have forced banks to pay interest on these accounts in all states was recently defeated in the House Banking Committee, it reportedly stands an excellent chance of passage in the next Congress. *Id.*

Such a plan is operating successfully in Canada, *id.*, and assuming congressional removal of federal restrictions as well as removal of restrictions by the states, it is submitted that some portion of these interest payments could be used to fund or at least supplement the CSF operations. For a discussion of how the present New Jersey CSF is operated, see Amster, *Clients' Security Funds: The New Jersey Story*, 62 A.B.A.J. 1610 (1976).

81. See *Cantor v. Supreme Court*, 353 F. Supp. 1307 (E.D. Pa.), *aff'd without opinion*, 487 F.2d 1394 (3d Cir. 1973). This case dealt with the annual assessment imposed upon Pennsylvania attorneys to support the operation of the Disciplinary Board. Several Pennsylvania attorneys challenged the assessment as a usurpation of legislative power by the court which denied them the "republican form of government" mandated by the guarantee clause in article IV, section 4 of the United States Constitution. 353 F. Supp. at 1315. The district court refused to consider plaintiffs' claims on the ground that the guarantee clause was not enforceable through the courts. *Id.* at 1315-16, quoting *Kaslin v. Warden*, 334 F. Supp. 602, 606 (E.D. Pa. 1971). Plaintiffs also argued that the assessment violated the separation of powers scheme of the Pennsylvania Constitution, thus infringing their due process and equal protection rights under the United States Constitution. 353 F. Supp. at 1316-18. The court found this claim nonjusticiable because it involved a political question. *Id.* at 1317-18.

It is submitted that while there are distinctions between establishing a basic disciplinary system and establishing a CSF, it is within the inherent power of the Pennsylvania Supreme Court, under article V, section 10(c) of the Pennsylvania Constitution, PA. CONST. art. 5, § 10(c), which grants the court power to prescribe general rules "for admission to the bar and to practice law," to establish such a fund. See also *Office of Disciplinary Counsel v. Walker*, ____ Pa. ____, 366 A.2d 563 (1976).

The present system has also proved organizationally ineffective.⁸² Under the present Pennsylvania CSF, the investigation of a claim is assigned to a bar association member located in the same county as the alleged defalcating attorney.⁸³ A bar member thus assigned must conduct an investigation on his own time — a monumental task for even the most dedicated members of the bar.⁸⁴

The unified system proposed by Judge Winnet would be operated under the auspices of the Pennsylvania Supreme Court and would allow the CSF Board to use "all reports of investigations and records of formal proceedings [under the control of the Disciplinary Board of the Pennsylvania Supreme Court] . . . with respect to any attorney whose conduct is alleged to amount to defalcation causing proximate monetary loss to a claimant."⁸⁵ The availability of the Disciplinary Board's investigative reports and other records which are not currently available to the present CSF Administrative Board would certainly be a more effective method of determining the validity of claims made on the CSF than that presently employed, since the proposed system provides for a more comprehensive and, in some instances, less biased investigation.⁸⁶

The proposed CSF would also allow the CSF Board to utilize the hearing committees of the Disciplinary Board for the purpose of conducting hearings to resolve the factual issues of each claim.⁸⁷ This would shift the responsibility of resolving factual issues from a bar member conducting the investigation to attorneys more accustomed to the role of factfinder.⁸⁸

82. See text accompanying notes 37 & 38 *supra*.

83. See note 46 and accompanying text *supra*.

84. Cf. CLARK REPORT, *supra* note 46, at 24-29 (Examining the problems involved in investigation of disciplinary charges when done on a decentralized basis).

85. Proposed Amendment, *supra* note 3, § 83.304(a).

86. The Disciplinary Board employs full-time investigators for each of the four disciplinary districts in the state. Interview with John W. Herron, *supra* note 11. Thus, it is submitted that employing persons who are not attorneys *solely* as investigators removes both the time constraints and the potential for bias inherent in the present CSF's procedure for investigation.

Also, while the proposed CSF does not specifically provide for the initiation of CSF Board investigations through the Disciplinary Board, such a result may be achieved indirectly. Since the Office of Disciplinary Counsel is presently required to investigate every complaint of unethical conduct that is not frivolous on its face, including those made by the CSF Board, the CSF Board could achieve the same results simply by registering their complaints with the Office of Disciplinary Counsel and then requesting their investigative reports as permitted under the proposed CSF.

87. Proposed Amendment, *supra* note 3, at § 83.304. Hearing Committees are established under rule 206 of the Rules of Disciplinary Enforcement, PA. R.D.E. 206, which defines the powers and duties of the hearing committee as follows:

(1) To conduct hearings into formal charges of misconduct

(2) To submit their findings and recommendations, together with the record of the hearing, to the Board.

(3) To review, by the member assigned, and approve or modify recommendations by Counsel for dismissals, informal admonitions and instructions of formal charges.

Id. 206(b) (1)-(3).

88. See note 87 *supra*.

Another salient feature of Judge Winnet's proposal is the removal of the requirement that the defalcation occur during the course of an attorney-client relationship.⁸⁹ The proposed CSF requires only that the defalcation occur while the attorney is acting in his role as an attorney.⁹⁰ Thus, the fund would become available to one who suffers a loss as a result of a defalcation committed by an attorney acting in a fiduciary capacity, as in the case of beneficiary of a will where the attorney for the decedent's estate embezzles the estate's funds.⁹¹

B. *Beyond the Winnet Proposal — Integration of Disciplinary Proceedings and Recovery Under the CSF*

While Judge Winnet's proposal envisions the partial integration of the Disciplinary Board and the CSF functions,⁹² it is submitted that total integration of the system is necessary for two reasons. First, under the present unintegrated system, the possibility exists that claimants will be treated disparately. For example, because a claimant, in order to recover under the present CSF, must show that the attorney involved was disbarred or suspended by the Pennsylvania Supreme Court,⁹³ he must proceed against the attorney via disciplinary proceedings before filing for recovery under the CSF.⁹⁴ In practice, however, a number of county CSF's occasionally waive the rules for recovering from the fund.⁹⁵ Thus, it is possible that a claimant could be reimbursed from the CSF for a loss suffered by him which was caused by the misappropriation of his funds by an attorney against whom no disciplinary proceedings had ever been instituted,⁹⁶ or that one claimant would bear the burden of proving the fact of disbarment, suspension, death, or disappearance, while another would not.

89. Proposed Amendment, *supra* note 3, § 83.304(c); see notes 41-43 and accompanying text *supra*.

90. Section 83.304(c) of the proposal states that "[t]he claimant need not be a client of the attorney, but the monetary loss shall have arisen in connection with activities which are part of or generally perceived by the public to be incident to the practice of law." Proposed Amendment, *supra* note 3, at § 83.304(c).

91. *Id.*; see note 43 and accompanying text *supra*.

92. Judge Winnet's basic reforms would accomplish integration in two ways: 1) the investigation of CSF claims would be performed by the Disciplinary Board; and 2) the Disciplinary Board hearing committee would become available for factfinding. See text accompanying notes 85-87 *supra*.

93. Interview with Judge Winnet, *supra* note 6; see note 45 and accompanying text *supra*.

94. Interview with Judge Winnet, *supra* note 6. An exception to this requirement is found where the alleged defalcating attorney is deceased. Because there is no action the Disciplinary Board can take, the claimant can proceed directly with the recovery procedure under the CSF. Interview with John W. Herron, *supra* note 11; see notes 44-51 and accompanying text *supra*; note 108 and accompanying text *infra*. Disciplinary proceedings are also occasionally bypassed when the defalcating attorney has disappeared. Interview with Judge Winnet, *supra* note 6.

95. Interview with Judge Winnet, *supra* note 6; interview with John W. Herron, *supra* note 11.

96. Interview with Judge Winnet, *supra* note 6; interview with John W. Herron, *supra* note 11.

Second, and more importantly, the current scheme encourages a duplication of effort, time, and resources. Neither the Office of Disciplinary Counsel nor the CSF Board is sure that all matters of attorney misconduct are known to both offices,⁹⁷ because both operate under separate confidentiality requirements which do not allow access to their files.⁹⁸

As the disciplinary system now operates, a complaint alleging unethical conduct on the part of an attorney is either filed by a member of the public or instituted by the Office of Disciplinary Counsel on its own initiative.⁹⁹ Unless frivolous on its face, an investigation of the complaint is instituted.¹⁰⁰ If the complaint proves actionable, the investigation also serves to amass evidence against the attorney involved.¹⁰¹

In the case of an actionable charge of embezzlement, a formal hearing is initiated and the matter is tried before a hearing committee.¹⁰² In order to sustain its burden of proof at the hearing, disciplinary counsel must establish that a defalcation has occurred and that the respondent attorney is responsible.¹⁰³ The hearing committee then makes the initial determination as to whether the defalcation in fact occurred and whether the conduct involved was unethical.¹⁰⁴ The Disciplinary Board then affirms or modifies the hearing committee's recommendation.¹⁰⁵

It seems only reasonable to suggest that the present disciplinary system, in addition to determining whether or not the attorney's conduct was unethical, should make the determination of whether or not any individuals are entitled to reimbursement from the fund. Although it has been suggested that such an integrated system would place an additional burden upon the already overburdened Office of Disciplinary Counsel,¹⁰⁶ this argument appears tenuous in light of the fact that the office already performs all of the work necessary to prove a defalcation, and, hence, whether a claimant has been aggrieved, when it conducts the disciplinary proceeding.¹⁰⁷ The only additional burden that might possibly arise would

97. Interview with Judge Winnet, *supra* note 6; interview with John W. Herron, *supra* note 11.

98. Interview with Judge Winnet, *supra* note 6; interview with John W. Herron, *supra* note 11. The Disciplinary Board is prohibited from revealing the information by supreme court rule. PA. R.D.E. 402(a). Information gathered by the CSF Board does not have to be disclosed to the Disciplinary Board under DR 1-103(A) because it is considered privileged. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103(A) (1970).

99. 204 PA. CODE § 87.1(b) [hereinafter cited as RULES OF THE DISCIPLINARY BOARD]. The distinction between the Rules of Disciplinary Enforcement and the Rules of the Disciplinary Board is that the former are promulgated by the Pennsylvania Supreme Court, whereas the latter are promulgated by the Disciplinary Board.

100. PA. R.D.E. 207(b) (1), (2).

101. Interview with John W. Herron, *supra* note 11.

102. PA. R.D.E. 208(b).

103. RULES OF THE DISCIPLINARY BOARD, *supra* note 99, at §§ 89-92(a).

104. PA. R.D.E. 208(b).

105. *Id.* 208(c).

106. Interview with Judge Winnet, *supra* note 6.

107. See text accompanying notes 99-104 *supra*.

be in the area of defalcations committed by attorneys who have died before disciplinary action was pursued.¹⁰⁸ While such cases do arise, it is submitted that they are not sufficient in number to unduly burden the Office of Disciplinary Counsel or to outweigh the need for an integrated system.¹⁰⁹

Integrated procedures such as that suggested above are currently followed in both California¹¹⁰ and Iowa.¹¹¹ In California, a Security Fund Committee assists the Disciplinary Board in the administration of the security fund.¹¹² It is the Disciplinary Board, however, which has the final authority to determine whether a reimbursable loss has occurred and the amount of the payment to be made.¹¹³

Perhaps the most pervasive system is that operated by the state of Iowa.¹¹⁴ The philosophy of the Iowa system is expressed in the preamble to rule 121 of the Iowa Supreme Court, which deals with the Client Security and Attorney Disciplinary System. This rule provides in pertinent part:

[T]his court declares that it has inherent and exclusive power to supervise the conduct of attorneys who are its officers and to prescribe reasonable conditions upon which persons may be admitted and permitted to practice in the courts of this state. The Supreme Court in the exercise of this power has the duty to protect insofar as reasonably possible those persons who may be injured by attorney defalcations.¹¹⁵

Under the Iowa system, one commission administers both the CSF and the disciplinary system.¹¹⁶ The commission is empowered to investigate attorney defalcations and breaches of the Iowa Code of Professional

108. Because the purpose of disciplinary proceedings is to protect the public rather than punish the attorney, the Disciplinary Board does not pursue disciplinary charges against a deceased attorney. Interview with John W. Herron, *supra* note 11. However, if an allegation of embezzlement can be proved, there is reason to pursue a CSF claim against a deceased attorney in that the client should be reimbursed for his financial loss.

In addition, the formation of an integrated system might encounter procedural difficulties since the person filing the disciplinary complaint is not considered a party to such action. Interview with John W. Herron, *supra* note 11. An integrated system would provide such a complainant with a pecuniary interest in the litigation without making such a person a party. However, continuation of the requirement that a claimant must subrogate his rights to the CSF, or, in a totally integrated system, to the Disciplinary Board, before he is allowed recovery should effectively alleviate such problems. See note 57 and accompanying text *supra*.

109. See notes 58-68 and accompanying text *supra*.

110. See CAL. BUS. & PROF. CODE § 6140.5 (West Supp. 1972).

111. See Iowa Rules Governing Admission to the Bar, 40 IOWA CODE ANN. ch. 610 app., Rules 121-121.5 (West 1975).

112. CAL. BUS. & PROF. CODE § 6140.5(a); Rules 112-113 foll. § 6087 (West 1974).

113. *Id.* 114. For a general discussion of the California CSF system, see Outcault & Peterson, *supra* note 11, at 684-92.

114. See 40 IOWA CODE ANN. ch. 610 app., Rules 121-121.5 (West 1975).

115. *Id.* rule 121.

116. *Id.* rule 121.1(a).

Responsibility,¹¹⁷ assist in both preventive and remedial attorney disciplinary procedure,¹¹⁸ and administer the Iowa CSF.¹¹⁹

The Iowa rules also provide for an audit and verification of all funds, securities, and other property held in trust by bar members.¹²⁰ Moreover, the rules state that, with certain specified exceptions, an attorney who wishes to act as a fiduciary must post a fidelity bond in an amount determined and approved by the court.¹²¹ By limiting the bond requirement to attorneys "appointed by a court in any fiduciary capacity for an estate, trust, guardianship or conservatorship,"¹²² Iowa has removed one of the principal arguments against requiring attorneys to be bonded — namely, that if all attorneys are required to be bonded, the bonding companies rather than the bar admissions committees would in effect determine who could practice.¹²³ Finally, the rules do not permit a waiver of the provisions contained therein.¹²⁴

C. *Audit of Attorneys' Accounts*

A number of commentators have suggested that Disciplinary Rule (DR) 9-102 of the ABA Code of Professional Responsibility,¹²⁵ which concerns the separation of client funds from the attorney's personal funds, gives the client a false sense of security when turning over the money to his attorney.¹²⁶ The problem with both DR 9-102 and the CSF is that these protective devices are triggered only after the defalcation has occurred and the client has sustained a loss.¹²⁷ Therefore, it seems appropriate for the courts and bar associations not only to take action to reimburse the client but also to institute preventive measures which will ensure that the loss does not occur.

117. *Id.* rule 121.1(b)(1).

118. *Id.* rule 121.1(b)(2).

119. *Id.* rule 121.1(b)(3).

120. *Id.* rule 121.4(a).

121. *Id.* rule 121.5(a). Excepted from the bonding requirement are attorneys related to the decedent, ward, or settlor, as the case may be, and attorneys acting as coexecutors, cotrustees, or coguardians where the other fiduciary party receives and disperses the funds involved. *Id.*

122. *Id.*

123. See M. BLOOM, *supra* note 26, at 48-49; D. HOPSON & Q. JOHNSTONE, *supra* note 57, at 506.

124. 40 IOWA CODE ANN. ch. 610 app., Rule 121.5(a). By contrast, rule VI of the PBA Rules of Procedure allows for waiver to achieve the objectives of the PBA. See PA. B.A.R.P. VI.

125. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-102 (1970).

126. See, e.g., Outcault & Peterson, *supra* note 11, at 685; Manahan, *supra* note 29, at 398.

127. But see PA. R.D.E. 207, which provides that Disciplinary Counsel who has the concurrence of a reviewing member of the Disciplinary Board may petition the Pennsylvania Supreme Court for temporary suspension, or some other appropriate remedy, if it appears that the continued practice of law by an attorney is causing immediate and substantial public or private harm and is in violation of a Disciplinary Rule. *Id.*

In this regard, several states have imposed a requirement calling for mandatory audits of attorney accounts.¹²⁸ For example, the rules of the Iowa Supreme Court require that each attorney authorize

the assistant administrator [of the Iowa Supreme Court] to investigate, audit, and verify all funds, securities, and other property held in trust by the member, and all related accounts, safe deposit boxes and any other form of maintaining trust property as required by the Iowa Code of Professional Responsibility for Lawyers, including but not restricted to DR 9-102, together with deposit slips, cancelled checks and all other records pertaining to transactions concerning such property.¹²⁹

The question has been raised whether the mandatory audit of attorney accounts is prohibited under the United States Supreme Court decision of *Spevack v. Klein*.¹³⁰ Despite his claim of protection under the fifth amendment,¹³¹ the attorney in *Spevack* was disbarred because he had refused to produce financial records demanded in a subpoena duces tecum and because he had refused to testify at the judicial proceeding convened to examine his conduct.¹³² The Supreme Court reversed the disbarment order, holding that the attorney could not be disbarred solely by virtue of exercising his fifth amendment privilege.¹³³ The Court did not reach the question of whether the attorney could be compelled to produce the required documents without violation of his fifth amendment right.¹³⁴ Several years prior to the *Spevack* decision, however, the Court had held in *Shapiro v. United States*¹³⁵ that

128. See text accompanying note 120 *supra*; DEL. SUP. CT. R. 32A(10), 16 DEL. CODE ANN. (Supp. 1976); 32 FLA. STAT. ANN. Integration Rule 11.02(4)(b) (Supp. 1977).

129. 40 IOWA CODE ANN. ch. 610 app., Rule 121.4(a)(1). The Iowa rules further require an attorney, when requested by the assistant administrator, to provide a written authorization to the bank to permit inspection of any accounts, safe deposit boxes, and other forms of maintaining trust property. *Id.* rule 121.4(a)(2).

130. 385 U.S. 511 (1967); see CLARK REPORT, *supra* note 46, at 172-74; Manahan, *supra* note 29, at 398.

131. 385 U.S. at 512-13.

132. *Id.* at 512.

133. *Id.* at 518-19.

134. *Id.* at 517. The Court did not decide the question because all tribunals involved except the court of appeals had proceeded on the assumption that although the fifth amendment protected the documents involved, the attorney could be disbarred solely for exercising his fifth amendment privilege. *Id.* at 517-18. Because the court of appeals had assumed that the documents in question were protected by the fifth amendment, the Court could not sustain the disbarment based upon *Shapiro v. United States*, 335 U.S. 1 (1948), because it had never been determined whether *Shapiro* was applicable. 385 U.S. at 517-19; see notes 135-38 and accompanying text *infra*.

135. 335 U.S. 1 (1948). Petitioner in *Shapiro* was a wholesaler subject to the war-time Emergency Price Control Act of 1942. *Id.* at 4. Under the Act petitioner was required to preserve for examination by the Office of Price Administration all his records or evidence of sales or delivery. *Id.* at 15. In response to a subpoena, petitioner produced the materials required by the Act and was subsequently prosecuted based upon information contained in the materials. *Id.* at 3-5. Petitioner claimed that the statute's sole purpose was to allow for the collection of information and that immunity from prosecution was provided for when the production of materials was

[i]t may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. *But no serious misgivings that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern to that the Government can constitutionally . . . require the keeping of particular records, subject to inspection by the [Price Control] Administrator.*¹³⁶

Thus, the question is whether or not the records and bookkeeping materials that the state statute or court rules require an attorney to maintain for auditing purposes are such that they would be included within the *Shapiro* public record exception to the fifth amendment. It appears that in light of both cases interpreting *Shapiro*¹³⁷ and recent commentary,¹³⁸ the records that attorneys would be required to keep would fall into the *Shapiro* exception. Support for this interpretation can be found in Justice Fortas' concurring opinion in *Spevack*, wherein he stated:

If this case presented the question whether a lawyer might be disbarred for refusal to keep or to produce, upon properly authorized and particularized demand, records which the lawyer was lawfully and properly required to keep by the State as a proper part of its functions in relation to him as a licensor of his high calling, I should feel compelled to vote to affirm. . . .¹³⁹

Therefore, as there are arguably no constitutional bars to requiring audits on attorneys' accounts, and in light of the success the procedure has had in other countries,¹⁴⁰ it is submitted that an audit system should be instituted along with any CSF to assure the client the maximum amount of protection.

compulsory. *Id.* at 2-7. The Court, however, rejected this argument. *Id.* at 7. In addition, the Court examined the constitutionality of the statute and found no constitutional defect. *Id.* at 32-33.

136. *Id.* at 32 (emphasis added).

137. See *United States v. Silverman*, 449 F.2d 1341 (2d Cir.), *cert. denied*, 405 U.S. 918 (1971) (inspection by IRS of attorney's written statements concerning contingent fees required to be kept by state law held not violative of fifth amendment); *Fairbank v. Hardin*, 429 F.2d 264 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970) (audit of livestock dealer's books and records required to be kept by federal statute not violative of the fifth amendment); *United States v. Kaufman*, 429 F.2d 240 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970) (inspection of stockbroker records by grand jury held not violative of the fifth amendment when records required to be kept by SEC regulation).

138. See CLARK, REPORT, *supra* note 46, at 172-74; Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970 (1968); Kaye & Neles, *Spevack v. Klein: Milestone or Millstone in Bar Discipline?* 53 A.B.A.J. 1121, 1123 (1967); Manahan, *supra* note 29, at 398.

139. 385 U.S. at 520 (Fortas, J., concurring).

140. See notes 24-27 and accompanying text *supra*.

D. *Reimbursement Through Means Other than the CSF*

A recent decision by the Pennsylvania Supreme Court has indicated a willingness by the court to grant monetary relief in a disciplinary proceeding to a victimized client without requiring the client to file a claim with the CSF. In *Office of Disciplinary Counsel v. Walker*,¹⁴¹ the respondent attorney was the scrivener of a number of wills for decedent.¹⁴² The final will, executed when decedent was eighty-eight years old, named the attorney as a beneficiary and coexecutor of the will.¹⁴³ After naming himself attorney for the estate,¹⁴⁴ the attorney proceeded to settle a contest over the will and exceptions to his first and final account.¹⁴⁵ The court held:

[I]t is apparent that respondent failed properly to represent the estate for which he was the attorney, failed to deal fairly with the other residuary beneficiaries whom he advised not to get independent counsel, and failed to conform to the ethics of his profession. Instead, respondent took advantage of his legal knowledge, his position as an attorney, and the respect and trust with which the other residuary legatees regarded him to further his private financial interests. We condemn this conduct most thoroughly.¹⁴⁶

In addition to suspending respondent from the practice of law for one year, the court ordered him to return all attorney's and executor's fees.¹⁴⁷

Although the attorney's conduct in the *Walker* case did not amount to a defalcation, the court, in a disciplinary proceeding, ordered the return of monies unethically obtained by him.¹⁴⁸ The court based its authority upon its inherent power to make and follow rules governing the conduct of its members.¹⁴⁹ If the court exercised this inherent power where an attorney's conduct did not amount to a defalcation, the argument for implementing such a remedy is even stronger when the unethical conduct involved in the disciplinary proceeding involves an intentional defalcation by an attorney.

141. ____ Pa. ____, 366 A.2d 563 (1976).

142. *Id.* at ____, 366 A.2d at 564-65.

143. *Id.* at ____, 366 A.2d at 565.

144. *Id.* at ____, 366 A.2d at 565.

145. *Id.* at ____, 366 A.2d at 565. The attorney, in his individual capacity, paid a total of \$152,500 for withdrawal of an appeal from probate by a disinherited nephew and for the withdrawal by the rest of the beneficiaries of their exceptions to his account. *Id.* at ____, 366 A.2d at 565. In addition, he discouraged the other beneficiaries from obtaining counsel and failed to notify them that neither in his capacity as executor nor attorney for the estate was he empowered to settle these claims. *Id.*

146. *Id.* at ____, 366 A.2d at 569.

147. *Id.* at ____, 366 A.2d at 569.

148. *Id.* at ____, 366 A.2d at 569.

149. *Id.* at ____, 366 A.2d at 568 n.7, quoting *In re Disbarment Proceedings*, 321 Pa. 81, 101, 184 A.2d 59, 68 (1936).

V. CONCLUSION

It is submitted that the Pennsylvania Supreme Court should actively strive to reform the current CSF, which is plagued by serious shortcomings.¹⁵⁰ While Judge Winnet's amendment offers several constructive proposals, the court should incorporate his suggested plan in a system which totally integrates the operations of the CSF and the Disciplinary Board, thus centralizing the CSF in an organization already knowledgeable in handling the problems of defalcating attorneys. Any additional assessment on Pennsylvania attorneys resulting from integration of the two systems would probably be kept to a minimum;¹⁵¹ indeed, the future assessments might actually be reduced by innovative means of funding, such as those currently being explored by the state of New Jersey.¹⁵² Finally, attorneys should be mindful that the individual who is reimbursed by the CSF is not the only one who benefits; rather, the legal profession as a whole is enriched by the improvement in the public's attitude towards the profession.

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150. See notes 58-68 and accompanying text *supra*.

151. See note 80 *supra*.

152. See *id.*

APPENDIX I

PROPOSED AMENDMENT TO THE PENNSYLVANIA RULES
OF DISCIPLINARY ENFORCEMENT

SUBCHAPTER E. CLIENT SECURITY FUND

§83.301. Definitions.

The following words and phrases, when used in this Subchapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Board." The Pennsylvania Client Security Fund Board.

"Claimant." A person who makes application to the Board for a disbursement from the fund.

"Fund." The Pennsylvania Client Security Fund.

§83.302. Pennsylvania Client Security Fund.

(a) There is hereby established in the Administrative Office of Pennsylvania Courts a separate fund to be known as the "Pennsylvania Client Security Fund." The fund shall consist of such amounts as shall be transferred to the fund pursuant to these rules. No claimant or other person shall have any legal interest in such fund or right to receive any portion thereof, except for discretionary disbursements therefrom directed by the Board, all payments from the fund being a matter of grace and not of right. The Supreme Court reserves the right to amend or repeal this Subchapter. The fund is created at the request of the bar for the purpose of establishing as far as practicable the collective responsibility of the bar in respect to losses caused to clients and others by defalcating members of the bar.

(b) Every attorney who is required to pay an annual assessment under Enforcement Rule 17-19 (relating to periodic assessment of attorneys) shall pay an additional annual fee of \$10.00 for the use of the fund. Such additional annual assessment shall be added to, and collected with and in the same manner as, the basic annual assessment, but the statement mailed by the Administrative Office pursuant to Enforcement Rule 17-19 shall separately identify the additional assessment imposed pursuant to this subdivision. All amounts received pursuant to this subdivision shall be credited to the fund.

(c) In January of each year the Board shall determine whether the fund is of sufficient amount to pay the existing claims against the fund and other claims which may be anticipated in the current and the next succeeding calendar year. If the Board so determines, it shall promptly certify such fact to the Administrative Office and the collection of the additional annual assessment under this rule for the next succeeding assessment year shall be omitted.

(d) The Administrative Office shall transfer to the fund all bequests and gifts hereafter made for the use of the fund.

§83.303. Pennsylvania Client Security Fund Board.

(a) The Supreme Court shall appoint a board to be known as the "Pennsylvania Client Security Fund Board" which shall consist of seven members of the bar of the Supreme Court, one of whom shall be designated by the Court as Chairman and another as Vice-Chairman.

(b) The regular terms of members of the Board shall be for three years, and no member shall serve for more than two consecutive three-year terms. The terms of one third of the members of the Board, as nearly as may be, shall expire in each year. The terms of members shall commence on April 1. The Board shall act with the concurrence of not less than four members. Four members shall constitute a quorum.

(c) The Board shall have the power and duty:

(1) To investigate applications by claimants for disbursements from the fund.

(2) To authorize disbursements from the fund and to fix the amount thereof.

(3) To adopt rules of procedure not inconsistent with these rules. Such rules may provide for the delegation to the Chairman or the Vice-Chairman of the power to act for the Board on administrative and procedural matters.

(4) To exercise the powers and perform the duties vested in and imposed upon the Board by law.

(d) The Administrative Office shall provide necessary clerical assistance to the Board and shall pay the cost thereof and the necessary travel and other expenses of the Board out of the fund.

§83.304. Investigation and payment of claims.

(a) At the request of the Board, The Disciplinary Board of the Supreme Court of Pennsylvania shall make available to the Board all reports of investigations and records of formal proceedings conducted under these rules with respect to any attorney whose conduct is alleged to amount to defalcation causing proximate monetary loss to a claimant.

(b) The Board may utilize a hearing committee designated by The Disciplinary Board of the Supreme Court of Pennsylvania within the appropriate disciplinary district to conduct any hearings under this Subchapter for the purpose of resolving factual issues.

(c) The Board may authorize the disbursement of a payment out of the fund to a claimant upon finding that conduct of any attorney subject to these rules which amounts to defalcation has caused proximate monetary loss to the claimant in an amount at least equal to the amount of the disbursement fixed by the Board. The claimant need not be a client of the attorney, but the monetary loss shall have arisen in connection with activities which are part of or generally perceived by the public to be incident to the practice of law. In exercising its discretion the Board may consider, among other things:

(1) The amount available and likely to become available to the fund for payment to claimants.

(2) The size and number of claims which are likely to be presented in the foreseeable future.

(3) The total amount of losses caused by defalcations by any one attorney or associated group of attorneys.

(4) The degree of hardship the claimant has suffered by the loss.

(d) In addition to such other conditions and requirements as it may impose, the Board may require a claimant as a condition of payment to execute such instruments, to take such action, and to enter into such agreements as the Board may require, including assignments of claims and subrogation agreements. Amounts recovered pursuant to any such arrangements shall be paid to the Administrative Office for reimbursement of the fund.

(e) Unless otherwise ordered by the Court, the maximum amount which may be disbursed from the fund to any one claimant with respect to the defalcation of any one attorney shall be \$15,000.

APPENDIX II

RULES OF PROCEDURE

CLIENTS' SECURITY FUND ADMINISTRATIVE BOARD

PENNSYLVANIA BAR ASSOCIATION

I. *Definitions*

For the purpose of these Rules of Procedure, the following definitions shall apply:

1. The "Board" shall mean the Clients' Security Fund Administrative Board.
2. The "Fund" shall mean the Clients' Security Fund.

3. A "lawyer" shall mean one who, at the time of the act complained of, was a member of the Bar of Pennsylvania, was domiciled in Pennsylvania, and was actually engaged in the practice of law in Pennsylvania.
 4. "Reimbursable Losses" are only those losses of money or other property of clients of lawyers which meet the following tests:
 - a. The defalcation which occasioned the loss occurred on or after February 2, 1960.
 - b. The loss was caused by the dishonest conduct of a lawyer acting as a lawyer, and arose out of his employment by a client.
- The following shall be excluded from "Reimbursable Losses":
- a. Losses of wives, members of immediate family, dependents, partners, and associates of lawyers.
 - b. Losses sustained while a lawyer was acting in a fiduciary capacity as an Administrator, Executor, Guardian, Trustee, etc.
5. "Dishonest conduct" shall mean wrongful acts committed by a lawyer against a person in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value.

II. Applications for Reimbursement

1. The Board shall prepare a form of application for reimbursement.
2. The form shall require, as minimum information:
 - a. The name and address of the lawyer.
 - b. The amount of the alleged loss claimed.
 - c. The date or period of time during which the alleged loss was incurred and the date and manner of its discovery.
 - d. A general statement of facts relative to the claim.
3. The form of application shall contain the following statement in bold type:

"In establishing the Clients' Security Fund, the Pennsylvania Bar Association did not create, nor acknowledge any legal responsibility for the acts of individual lawyers in their practice of law. All reimbursements of losses by the Clients' Security Fund shall be a matter of grace in the sole discretion of the Board administering the Fund and not as a matter of right. No client or member of the public shall have any right in the Clients' Security Fund as a third party beneficiary or otherwise."
4. Applications shall be addressed to the central office of the Pennsylvania Bar Association at 401 North Front Street, Harrisburg, Pennsylvania, and shall forthwith be transmitted by such office to the Chairman of the Clients' Security Fund Administrative Board.

III. Processing Applications

- A. The Chairman of the Board shall cause each such application to be sent to a member of the Board or other member of the Pennsylvania Bar Association for investigation and report; a copy shall be sent by registered mail to the lawyer who it is claimed committed the dishonest act. Wherever possible, the member to whom such application is referred shall practice in the county wherein the alleged defalcating attorney practiced. Before transmitting applications for investigation, the Chairman may request of the applicant further information with respect to the alleged claim. Such member shall be reimbursed for reasonable out-of-pocket expenses incurred by him or her, as the case may be, in making such investigation.
- B. When, in the opinion of the member to whom an application has been referred, the claim is clearly not for a reimbursable loss, no further investigation need be conducted, but a report with respect to such claim shall be made by the member to whom the application was referred, as hereafter specified.

- C. A member to whom a report is referred for investigation shall conduct such investigation and may require the applicant to furnish such additional information or evidence as he deems necessary or desirable to determine whether the claim is for a reimbursable loss and to guide the Board in determining the extent, if any, to which such applicant should be reimbursed from the Fund.
- D. Reports with respect to applications shall be submitted by the members to whom they have been referred for investigation to the Chairman of the Board, if feasible, by December 1st in each year. The Chairman shall summarize each report in such detail as to him shall seem necessary and shall send to each member of the Board a copy of such summary wherever possible, and when requested, a full copy of the investigating member's report.
- E. No application submitted after October 1 in any year shall and no claim with respect to which an inadequate opportunity for investigation has been afforded need be considered by the Board for reimbursement in the year in which such claim is presented.
- F. Applications shall be processed on the basis of information contained therein and in the report of the member who processed such claims. The Board may hear the applicant and the alleged defalcating attorney or other evidence on behalf of the applicant in those instances where the reporting member in his report suggests or where any other member of the Board, after studying the summaries of claims to be processed or reports, requests that testimony be presented.
- G. The Board, at its annual meeting and at such other meetings as the Board may desire, in its sole discretion, shall determine the amount of loss, if any, for which any applicant shall be reimbursed from the Fund. In making such determination, the Board shall consider, *inter alia*, the following:
 - 1. The negligence, if any, of the client which contributed to the loss.
 - 2. The comparative hardship the client has suffered by the loss.
 - 3. The total amount of reimbursable losses of the clients of any one lawyer or association of lawyers.
 - 4. The total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund.
 - 5. No reimbursement shall be made to any applicant, a summary of whose claim has not been submitted to the members in accordance with Paragraph III D of these rules of procedure. No reimbursement shall be made to any applicant unless approved by a majority of the Board present and voting at the meeting of the Board at which the application is processed.

IV. *Subrogation for Reimbursements Made*

In the event reimbursement is made to an applicant, the Fund shall be subrogated in said amount and may bring such action as it deems advisable against the lawyer, his assets or his estate, either in the name of the applicant or in the name of Pennsylvania Bar Association. The applicant shall be required to execute a subrogation agreement in said regard. The reimbursed person shall be advised at his last known address of the commencement of an action by the Pennsylvania Bar Association pursuant to its subrogation rights.

V. *Meetings of the Board*

- A. The Board shall hold its annual meeting at the headquarters of the Pennsylvania Bar Association in Harrisburg, Pennsylvania, or at such other place, and, at such time as the Chairman shall fix during the period commencing December 1 and ending during the annual meeting of the Association.
- B. The Board shall also meet from time to time upon call of the Chairman or, at the request of at least two members of the Board; provided, however, that reasonable notice of the time and place of such meeting shall be given to each member of the Board.

VI. General Purposes

In any given case, the Board may waive technical adherence to these Rules of Procedure in order to achieve the objectives of the Pennsylvania Bar Association as contained in its enabling Resolution establishing the Fund adopted February 2, 1960, as amended.

VII. General Provisions

- A. With the exception of reports of the Board to the Association, no publicity shall be given by the Board to applications for reimbursement, payments made by the Board or to any action of the Board relating to such applications and reimbursements without the express prior approval of the Board of Governors of the Pennsylvania Bar Association.
- B. In all cases where local bar associations have clients' security funds and contribution toward the settlement of claims is sought from the Pennsylvania Bar Association, it shall be required that the county bar association or its appropriate committee shall:
 1. Notify the Pennsylvania Bar Association, not less than 30 days after the filing of the claim,
 2. Supply the Pennsylvania Bar Association with copies of all claim documents,
 3. Give adequate written notice to the Pennsylvania Bar Association of any hearing on such claim, and
 4. Afford the Pennsylvania Bar Association opportunity to consult in respect of payment of said claim.